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ALEXANDER L. STEVAS,
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No. 82-268

IN THE

Supreme Court of the United States

October Term, 1982

FIRST PENNSYLVANIA BANK, N.A.,
Appellant
v.
LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee
and
DELLA BECKER,
Appellee

On Appeal From the Supreme Court of the Commonwealth of Pennsylvania

REPLY BRIEF OF APPELLANT FIRST PENNSYLVANIA BANK, N.A. TO APPELLEE DELLA BECKER'S MOTION TO DISMISS

RICHARD M. SHUSTERMAN
(Counsel of Record)
RANDY A. MASLOW
Attorneys for Appellant

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ARGUMENT

1. Reply to Appellee's First Argument

Appellee Della Becker alleges in her Motion to Dismiss that "appellant failed to give notice to the Pennsylvania Attorney General as required by Pa. R. C. P. 235." Appellee Della Becker's Motion to Dismiss at 7 (hereinafter, "Motion to Dismiss"). Appellee further alleges that appellant First Pennsylvania Bank, N.A. ("First Pennsylvania") has failed to comply with Rule 28.4(c) of this Court, and that appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law "was deemed abandoned for failure to comply with Pa. R. C. P. 235." Motion to Dismiss at 8. Each and every one of these allegations is simply incorrect. Appellant has complied with Pa. R. C. P. 235 at each and every stage of the litigation in the state courts below, having notified the Attorney General of Pennsylvania by registered mail that a question had been raised as to the constitutionality of the Pennsylvania Real Estate Tax Sale Law in First Pennsylvania's Complaint filed in the Court of Common Pleas of Lancaster County, in First Pennsylvania's Complaint filed in the United States District Court for the Eastern District of Pennsylvania on June 27, 1975, and in First Pennsylvania's Appeal to the Commonwealth Court of Pennsylvania. Copies of the notices from appellant to the Attorney General of Pennsylvania in each of the above instances, together with copies of the Pennsylvania Attorney General Office's acknowledgments of receipt of such notices, are set forth in the Supplemental Appendix hereto at A1-A7. In addition, appellant has complied with Rule 28.4(c) of this Court, having served a copy of its Jurisdictional Statement upon the Attorney General of Pennsylvania on

August 16, 1982. A copy of the Receipt for Certified Mail, acknowledging receipt by the Pennsylvania Attorney General's Office, is set forth in the Supplemental Appendix hereto at A9-A10. Furthermore, appellee's assertion that "appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law was deemed abandoned for failure to comply with Pa. R. C. P. 235" (Motion to Dismiss at 8) is totally without merit. Not only has appellant clearly complied with Pa. R. C. P. 235 at each stage of the proceedings in the state courts below, but even if appellant had not so complied, it is simply untrue that any state court below "deemed" appellant's constitutional challenge "abandoned". This alleged "issue" of compliance with Pa. R. C. P. 235 was not (and in fact could not have been) raised at any stage of the proceedings in the state courts below. Appellant has fully complied with all requirements of Pa. R. C. P. 235 and Rule 28.4(c) of this Court. Appellant's federal question was properly raised at each stage of the litigation in the courts of the Commonwealth of Pennsylvania. See opinions and orders fully set forth in the Appendix to First Pennsylvania's Jurisdictional Statement.

2. Reply to Appellee's Second Argument

Appellant filed a complaint in the United States District Court for the Eastern District of Pennsylvania in June, 1975, No. 75-1858. On November 21, 1975, by Order of the Honorable E. Mac Troutman, the court stayed the proceedings pending disposition of First Pennsylvania's related action (the instant case) in the courts of the Commonwealth of Pennsylvania. Judge Troutman further ordered that the Clerk of Court mark the federal action closed for statistical purposes and that the matter be placed in the civil suspense file. Copies of the district court's

Order and the docket entries in the federal action are provided in the Supplemental Appendix hereto at A11-A16.

3. Reply to Appellee's Third Argument

In reply to the third argument raised in appellee's Motion to Dismiss to the effect that the federal question is not substantial, appellant First Pennsylvania Bank, N.A., hereby incorporates its previously filed Jurisdictional Statement as if fully set forth herein, which Jurisdictional Statement clearly shows that the federal question raised therein is substantial. Appellant further notes that this Court noted probable jurisdiction in the appeal of *Mennonite Board of Missions, Inc. v. Adams*, 427 N. E. 2d 686 (Ind. Ct. App. 1981), *prob. juris. noted*, No. 82-11 (U. S. Sup. Ct., October 12, 1982). The *Mennonite* case raises virtually identical issues as to the constitutionality of Indiana's pre-tax sale notice provisions under the Indiana Tax Sale Statutes, Ind. Code §§ 6-1.1-24-1 to 6-1.1-25-19 (1976). The Indiana statute, like the Pennsylvania statute, provides that, with respect to a mortgagee the name and address of which is a matter of public record, notice of an impending tax sale need only be posted and published. Ind. Code § 6-1.1-24-3 (1976); 72 Pa. Cons. Stat. Ann. § 5860.602 (Purdon 1968). As in the instant appeal, the Appellants in *Mennonite Board of Missions, Inc. v. Adams* have challenged state pre-tax sale notice statute provisions as insufficient to meet constitutional due process standards. The federal question raised in the instant appeal is clearly substantial.

4. Reply to Appellee's Fourth Argument

Appellee alleges in Part 4 of her Motion to Dismiss that the Pennsylvania Deficiency Judgment Act operates

to discharge appellant's mortgage, and that the alleged operation of the Deficiency Judgment Act provides an independent and adequate state grounds for the judgment of the Pennsylvania Supreme Court. This alleged issue was never decided in the course of the proceedings below in the Common Pleas and Commonwealth Courts of Pennsylvania, respectively. The opinion of the Chancellor in the state trial court noted that:

> "The only issue deserving extended discussion is whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for personal notice of proposed tax sales." Appendix to Appellant's Jurisdictional Statement at A12.

The Chancellor expressly held that the Pennsylvania Real Estate Tax Sale Law is constitutional and does not offend the Fifth and Fourteenth Amendments to the United States Constitution. *Id.* at A14.

Judge Richard Disalle's opinion for the Commonwealth Court, which affirmed on the basis of Chancellor Bucher's Adjudication and Decree Nisi and the Opinion and Final Decree of the Common Pleas Court *en banc*, explicitly notes that "the Chancellor refused to set aside the disputed tax sale and held the Real Estate Tax Sale Law . . . to be constitutional." Appendix to Appellant's Jurisdictional Statement at A2-3.

The Pennsylvania Supreme Court's Decree indicates merely that "the appeal having been improvidently granted, the same is hereby dismissed." Appendix to Appellant's Jurisdictional Statement at A16. The Pennsylvania Supreme Court's judgment makes no reference to any alleged operation of the Deficiency Judgment Act as bearing on its decision. The only relevant issue de-

veloped in the courts below [1] was the constitutional challenge of the appellant to the pre-tax sale notice provisions of the Pennsylvania Real Estate Tax Sale Law. The Pennsylvania Supreme Court's Decree merely shows that the Pennsylvania Supreme Court declined to exercise its discretionary review of the decisions by the trial and intermediate appellate courts rejecting appellant's constitutional challenge to the pre-tax sale notice provisions of the Pennsylvania Real Estate Tax Sale Law.

This Court has heard numerous cases on the merits where the highest court of the state refused to exercise discretionary review, as happened in this case. *See e.g., Douglas v. California,* 372 U. S. 353 (1963); *Konigsberg v. State Bar,* 353 U. S. 252 (1957). Moreover, there is no requirement that the highest court of the state explicitly enter a written opinion upholding a state statute in the face of a challenge based on the Federal Constitution in order for this Court to hear the appeal. In *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63 (1928), the Court stated:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular formal words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

1. The issue of whether or not the sale should have been set aside on equitable grounds was raised by appellant and rejected by the courts below. The rejection of that argument required the state courts to reach appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law. Only if the state courts had accepted appellant's equity argument would it have been unnecessary for the state courts to reach the federal constitutional issue.

> And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. *If the necessary effect of the judgment has been to deny the claim, that is enough.*" 278 U. S. at 67 (emphasis added).

Here, appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law was the very same issue raised below and the "necessary effect" of the Pennsylvania Supreme Court's order dismissing the appeal was to affirm the order of the Commonwealth Court and to deny appellant's constitutional claim. To say that the judgment of the Supreme Court of Pennsylvania was based on appellee's version of the alleged operation of the Pennsylvania Deficiency Judgment Act is mere speculation and is not supported by the record, which shows that appellant's constitutional challenge was clearly raised, considered and rejected by the trial and intermediate appellate court below. The mere possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law, does not create an adequate and independent state ground to support the decision of the state courts in rejecting appellant's constitutional challenge. *See e.g., United Airlines, Inc. v. Mahin*, 410 U. S. 623, 630 (1973), *citing Beecher v. Alabama*, 389 U. S. 35, 37 n. 3 (1967). *See also Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 98 (1938). This Court is presented with a substantial federal question which was clearly presented and rejected by the state courts below.

There are no independent and adequate state grounds to support the judgment of the Pennsylvania Supreme Court. Appellant's constitutional challenge to the Pennsylvania Real Estate Tax Sale Law was clearly raised and considered below by the courts of the Commonwealth of Pennsylvania. The decision of the Supreme Court of Pennsylvania, refusing to exercise its discretionary power to review the Pennsylvania Commonwealth Court's rejection of appellant's federal constitutional challenge to the Pennsylvania Real Estate Tax Sale Law, provides no independent and adequate state grounds to support the decision below.

Respectfully submitted,

RICHARD M. SHUSTERMAN
(Counsel of Record)
RANDY A. MASLOW
Attorneys for Appellant

Of Counsel:

WHITE AND WILLIAMS
1234 Market Street
Philadelphia, PA 19107

9/2-7764 October 20, 1975

Hubert B. Barnes,
Deputy Attorney General
Pennsylvania Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17102

Re: First Pennsylvania Bank v. Lancaster
County Tax Claim Bureau, et al.

Dear Mr. Barnes:

Enclosed is a copy of a Complaint filed in the Court of Common Pleas of Lancaster County on behalf of our client, First Pennsylvania Bank N.A. You will note that it is alleged that the Pennsylvania Real Estate Tax Sale Law, 72 P.S. section 5860.101 et. seq. and particularly section 602 thereof, 72 P.S. 5860.602 is unconstitutional as applied to the plaintiff, a mortgagee of real property, in that it authorizes the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This notice is sent pursuant to Rule 235(a) of the Pennsylvania Rules of Civil Procedure.

Respectfully yours,

Miles H. Shore

MHS:cp
Enclosures

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

bcc: Mr. William C. Ensslen, Jr.,
Vice President
Alan E. Casnoff, Esquire

Law Offices of
SAUL, EWING, REMICK & SAUL
38th Floor Centre Square West
Philadelphia 19102

Cable Address: BIDSAL
Telephone (215) 972-7777
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Telex 83-4798
Direct Dial (215) 972-7764

Associated Offices
Harrisburg, Pa.
Washington, D. C.
London, England
Frankfurt/Main, Germany

August 2, 1978

Attorney General
Commonwealth of Pennsylvania
Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17102

Re: First Pennsylvania Bank N.A. v.
Lancaster County Tax Claim Bureau
and Della Becker—Commonwealth
Court—No. 944 C.D.—1978

Dear Sir:

This is to advise you that an appeal has been filed by First Pennsylvania Bank from the Court of Common Pleas of Lancaster County to the Commonwealth Court in the above case in which appeal it is argued that the Pennsylvania Real Estate Tax Sale Law, 72 P.S. § 5860.101 et seq. and particularly § 602 thereof, 72 P.S. 5860.602, is unconstitutional as applied to First Pennsylvania Bank, a mortgagee of real property, in that it authorizes the taking of valuable property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This notice is sent pursuant to Rule 521(a) of the Pennsylvania Rules of Appellate Procedure.

Prior notice of the filing of the Complaint in the lower court was given to your office by my letter dated October 20, 1975 addressed to Hubert B. Barnes, Deputy Attorney General, receipt of which was acknowledged by Jeffrey Cooper, Deputy Attorney General.

Very truly yours,

Miles H. Shore

MHS:cp

cc: Maurice M. Green, Esquire
Carl G. Herr, Esquire

972-7764 June 30, 1975

The Honorable Robert P. Kane,
Attorney General
Pennsylvania Department of Justice
Harrisburg, Pennsylvania 17102

Re: First Pennsylvania Bank v. Lancaster
County Tax Claim Bureau et al.

Dear General Kane:

Enclosed is a copy of a Complaint filed in the United States District Court for the Eastern District of Pennsylvania on June 27, 1975 on behalf of our client, First Pennsylvania Bank N.A. You will note that it is alleged that the Pennsylvania Real Estate Tax Sale Law, 72 P.S. section 5860.101 et seq. and particularly section 602 thereof, 72 P.S. 5860.602 is unconstitutional as applied to the plaintiff, a mortgagee of real property, in that it authorizes the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This notice is sent pursuant to Rule 235(a) of the Pennsylvania Rules of Civil Procedure and the Federal Rules of Civil Procedure, if applicable.

Respectfully yours,
Miles H. Shore

cp
Enclosures

cc: Mr. William C. Ensslen, Jr.,
Vice President
Frank O'Donnell, Esquire
Alan E. Casnoff, Esquire

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
HARRISBURG, PA. 17120

October 22, 1975

Miles H. Shore, Esquire
Saul, Ewing, Remick & Saul
38th Floor
Center Square West
Philadelphia, PA 19102

Re: First Pennsylvania Bank v. Lancaster County
Tax Claim Bureau, et al.,

Dear Mr. Shore:

This is to acknowledge our receipt of your notice pursuant to Pennsylvania Rule of Civil Procedure 235. This matter will be reviewed and considered by our staff to determine if involvement by our office is warranted. If we decide this matter warrants our involvement, we will, of course, promptly notify you.

Sincerely,

/s/ JEFFREY COOPER
Jeffrey Cooper
Deputy Attorney General

JC/pay

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
HARRISBURG, PA. 17120

August 18, 1978

Miles H. Shore, Esquire
Saul, Ewing, Remick & Saul
38th Floor Centre Square West
Philadelphia, Pennsylvania 19102

Re: First Pennsylvania Bank N.A. v.
Lancaster County Tax Claim Bureau
and Della Becker—Commonwealth
Court—No. 944 C.D.—178

Dear Mr. Shore:

This will acknowledge receipt of your letter with regard to the above captioned matter, pursuant to Rule 521(a) of the Pennsylvania Rules of Appellate Procedure. This matter will be reviewed and considered by our staff to determine if involvement by our office is warranted. If we decide this matter warrants our involvement, we will, of course, promptly notify you.

Very truly yours,

/s/ LORIE J. PAPAGODA
Lorie J. Papagoda
Paralegal

LJP/le

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
HARRISBURG, PA. 17120
Capitol Annex
(717) 787-4453

July 11, 1975

Miles H. Shore, Esquire
Saul, Ewing, Remick & Saul
38th Floor Centre Square West
Philadelphia, PA 19102

Re: First Pennsylvania Bank v. Lancaster County
Tax Claim Bureau, et al.,

Dear Mr. Shore:

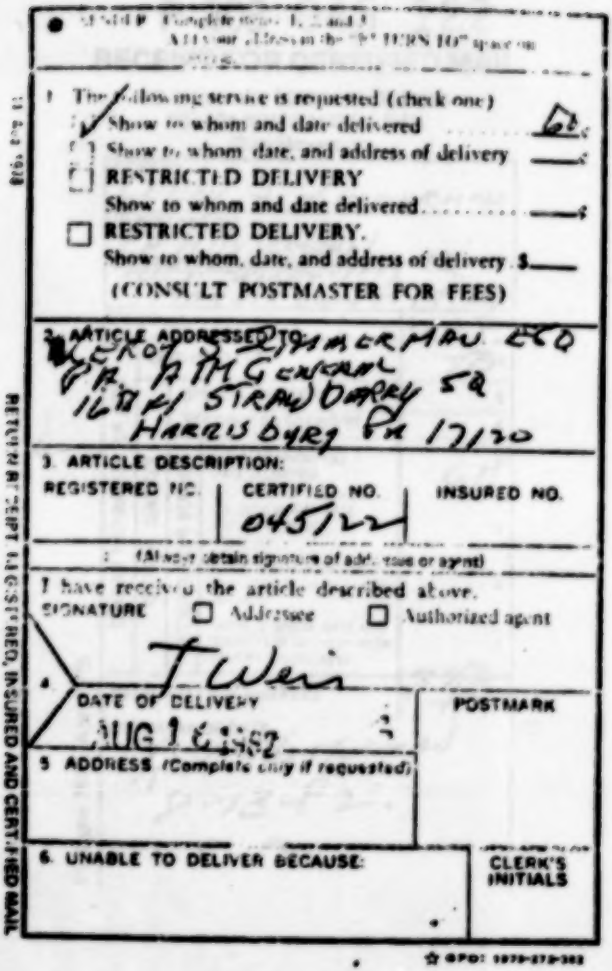
This is to acknowledge our receipt of your notice pursuant to Pennsylvania Rule of Civil Procedure 235. This matter will be reviewed and considered by our staff to determine if involvement by our office is warranted. If we decide this matter warrants our involvement, we will, of course, promptly notify you.

Sincerely,

/s/ HUBERT B. BARNES
Hubert B. Barnes
Deputy Attorney General

HBB/slb

cc: Clerk of Court
U.S. District Court
Eastern District of Pa.



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IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-1858

FIRST PENNSYLVANIA BANK N.A.

v.

LANCASTER COUNTY TAX CLAIM BUREAU

and

MILLERSVILLE BOROUGH

and

COUNTY OF LANCASTER

and

SCHOOL DISTRICT OF LANCASTER

and

DELLA BECKER

ORDER

AND Now, this 21st day of November 1975, the court having been previously advised that the above action cannot proceed to trial and disposition because of the following reason:

Order staying these proceedings pending disposition of a related action.

it is

ORDERED that the Clerk of Court mark this action closed for statistical purposes and place the matter in the Civil Suspense File, and it is

FURTHER ORDERED that the Court shall retain jurisdiction; and that the case be restored to the trial docket when the action is in a status so that it may proceed to final disposition; this order shall not prejudice the rights of the parties to this litigation.

BY THE COURT:

/s/ E. MAC TROUTMAN, *J.*
E. Mac Troutman

Current Docket Entries in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 75-1858

FIRST PENNSYLVANIA BANK N.A.

Plaintiff

v.

LANCASTER COUNTY TAX CLAIM BUREAU

&

MILLERSVILLE BOROUGH

&

COUNTY OF LANCASTER

&

SCHOOL DISTRICT OF LANCASTER

&

DELLA BECKER

Defendants

CAUSE: Civil Rights
(Action to set aside a Tax Sale)
42 USCA § 1983
28 USCA §§ 1331 & 1343

MILES H. SHORE, ESQ.
SAUL, EWING, REMICK & SAUL
38th Floor—Centre Square West
Philadelphia, Pa. 19102

MAURICE M. GREEN, ESQ.
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Phila., Pa. 19102
FOR: DELLA BECKER

GEORGE T. BRUBAKER, ESQ.
BRUBAKER AND BRUBAKER
21 North Duke Street
Lancaster, Pa. 17602
FOR: SCHOOL DISTRICT OF LANCASTER

JOHN B. RENGIER, ESQ.
RENGIER, MUSSER & STENGEL
8th Fl. Griest Bldg., 8 N. Queen St.
Lancaster, Pa. 17603
FOR: BOROUGH OF MILLERSVILLE

CARL G. HERR, ESQ.
HERR, KIRCHNER & HERR
Griest Building, 8 North Queen St.
Lancaster, Pa. 17603
FOR: LANCASTER COUNTY TAX CLAIM
BUREAU OF THE COUNTY OF LANCASTER

1975

June 27 Complaint filed.

June 27 Summons exit.

Aug. 19 Summons returned: "on 7/15/75 served Della Becker", and "on 7/9/75 served Lancaster County Tax Claim Bureau, Millersville Borough, County of Lancaster, & served School District of Lancaster", and filed.

Aug. 19 Appearance of Maurice M. Green, Esq., as counsel for deft. Della Becker.

Aug. 20 Appearance of George T. Brubaker, Esq. of Brubaker and Brubaker, on behalf of the School District of Lancaster, deft., filed.

Aug. 25 Appearance of John P. Rengier, Esq., Rengier, Musser & Stengel, for the Borough of Millersville, filed.

Aug. 25 Appearance of Carl G. Herr, Esq., Herr, Hirchner & Herr as counsel for Lancaster County Tax Claim Bureau & for the County of Lancaster, filed.

Aug. 25 Letter dd. 8/21/75 from C. G. Herr, Esq. to Clerk of Court, entering his appearance for County of Lancaster & Lancaster County Tax Claim Bureau & advising that, by agreement with Miles H. Shore, Esq. (Plff's attorney) that the time within which to file pleadings in this case was extended for an additional period of 30 days (from 7/9/75), filed.

Aug. 29 Motion of Della Becker to Dismiss, briefs in support of motion and cert. of service, filed.

Aug. 29 Answer to motion of Della Becker to dismiss, filed.

Sept. 4 Defts' Motion to Stay Proceedings and Certificate of Service thereof, filed

Sept. 12 Memorandum of Law supporting motion to stay proceedings submitted by defts, Lancaster County Tax Claim Bureau, Millersville Borough, County of Lancaster & School District of Lancaster, filed.

Sept. 12 Certificate of service of Memor. of Law supporting Motion to Stay Proceedings, filed.

Oct. 6 Plff's consolidated memorandum of law in opposition to deft Della Becker's Motion to Dismiss & other deft's motion to stay proceedings, filed.

Nov. 24 Order dd. 11/21/75 that motion of defts, Lancaster County Tax Claim Bureau, Millersville Borough, County of Lancaster & School District of Lancaster, to stay proceedings in this Court is GRANTED, etc.; pending resolution of the related cases filed in Court of Common Pleas, Lancaster. Further ordered that the motion of deft. Della Becker, to dismiss Complaint is DENIED without prejudice, etc., filed. (MT)
(11/21/75 copies mailed—11/25/75 entered)

Nov. 24 Order dd. 11/21/75 staying these proceedings pending disposition of a related action; Ordered that the Clerk of Court mark this action closed for statistical purposes & placed in Civil Suspense File, etc., filed. (11/21/75 copies mailed—11/25/75 entered) (MT)